

**JOINT SUBMISSION
RE:
PRESERVATION IN
LIGHT OF CLASS
CERTIFICATION
ORDER**

**Redacted Version
of Document Sought
to be Sealed**

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO,
individually and on behalf of themselves and
all others similarly situated,

Plaintiff,

vs.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**JOINT SUBMISSION RE:
PRESERVATION IN LIGHT OF CLASS
CERTIFICATION ORDER**

Judge: Hon. Susan van Keulen

1 January 6, 2023

2 Submitted via ECF

3 Magistrate Judge Susan van Keulen
4 San Jose Courthouse
5 Courtroom 6 - 4th Floor
6 280 South 1st Street
7 San Jose, CA 95113

8 Re: Joint Submission re: Preservation Obligations In Light Of Class Certification Order
9 *Brown v. Google LLC*, Case No. 5:20-cv-03664-LHK-SVK (N.D. Cal.)

10 Dear Magistrate Judge van Keulen:

11 Pursuant to Your Honor's November 2021 Civil and Discovery Referral Matters Standing
12 Order, Plaintiffs and Google LLC ("Google") jointly submit this statement regarding their dispute
13 over Google's obligation to continue preservation in light of Judge Gonzalez-Rogers' December
14 12, 2022 denial of Plaintiffs' Rule 23(b)(3) class.

15 Fact discovery has closed. A trial date has not yet been set. Exhibit A contains each
16 party's respective proposed order.
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GOOGLE’S STATEMENT

On December 12, 2022, Judge Gonzalez Rogers denied Plaintiffs’ motion to certify a damages class under Rule 23(b)(3). Dkt. 803. Throughout this litigation, Plaintiffs’ request for a damages class was the rationale for discovery into (and preservation of) the detailed, massive, log-based class-wide data, and culminated in this Court’s July 15 and May 20, 2022 Preservation Orders. *See* Dkt. Nos. 587, 657. Pursuant to those Orders, Google has preserved an enormous quantity of log-based data, and it continues to add large amounts of data daily, at a large monetary, human, and business cost. Neither the injunctive relief alone nor a long-shot Rule 23(f) appeal can now justify continuing to impose on Google these tremendous preservation costs. Google respectfully seeks an order (i) releasing Google from ongoing preservation (i.e., the obligation to preserve new data that has not yet been created); and (ii) either (a) allowing Google to delete the data it has already collected and is preserving pursuant to the Preservation Orders; or (b) shifting the cost of the preservation of such data to Plaintiffs.

Ongoing preservation efforts were largely directed at Plaintiffs’ proposed Rule 23(b)(3) damages class. Throughout this litigation, Plaintiffs have continually argued that Google must preserve data because it relates to identification of class members’ data, damages for their proposed class, claims administration, or defenses Plaintiffs anticipated Google would assert in opposition to class certification:

- Dkt. 560-2, Plaintiffs’ April 25, 2022 Resp. to Google’s Obj. to SM Preservation Plan, at 1 (“Google objects [to the preservation plan] solely based on relevance, or ‘scope’: According to Google, any log that is generated while a user is signed into his or her Google account is irrelevant because the user’s activity, while signed in, is ‘outside of the case scope.’ *Google is wrong because these signed-in logs contain an abundance of identifying information that Plaintiffs expect to use to identify class members’ data in the signed-out logs.*”);
- *Id.* (arguing Google’s “‘scope’ objection is without merit because Plaintiffs *expect these logs to contain information relevant and helpful to identifying class members and their event-level transactions in the ‘signed-out’ logs.*”);

- 1 • *Id.* (arguing for preservation because “Google has previewed that it intends to raise
2 [ascertainability] as a *defense against class certification* [and] Google should not be
3 permitted to weaponize spoliation of relevant data.”).
- 4 • Dkt. 799-1 at 7 (arguing that Google’s request for relief from certain aspects of the
5 Preservation Orders should be denied because “[t]he amount in controversy is . . . billions
6 of dollars”).

7 ***The Preserved Event-Level Class Data Has No Relevance to Plaintiffs’ Injunctive Class.***

8 As far as the class-wide practices that would be relevant to an injunctive class, Plaintiffs have
9 already told the Court that they “believe that our experts have demonstrated that through common
10 evidence that predominated, Google’s practices were class-wide. It can be demonstrated with the
11 test data that we have, documents and deposition testimony that we have obtained.” May 3, 2022
12 Hr’g Tr. 31:9-32:3; *see also id.* 13:6-8. Even without this admission, the data would have no bearing
13 on the class-wide injunctive relief sought by the class that the Court certified. When granting the
14 Plaintiffs’ class for purposes of injunctive relief, the Court explained:

15 Injunctive relief would (1) preclude Google from collecting further private browsing
16 information; (2) require Google to delete the private browsing information that it
17 previously collected and is currently storing; (3) require Google to remove any
18 services that were developed or improved with the private browsing information; and
19 (4) appointment of an independent third-party to verify that the injunctive relief has
20 been implemented. These would be important changes to reflect transparency in the
21 system.

22 Dkt. 803 at 33-34. The large-scale preservation of event-level class-wide data is not required for
23 Plaintiffs to litigate (or for Google to eventually implement if Plaintiffs are successful) the relief
24 they seek. Indeed, preservation runs contrary to this relief: Google is paying to segregate and store
25 (instead of routinely delete) data just so the class can later compel Google to delete it. This serves
26 no party.

27 ***The Cost of Continuing to Implement the Preservation Orders Is Immense and Cannot***
28 ***Be Justified In Light of Judge Gonzalez Rogers’ Class Certification Order.*** Google estimates that
its current preservation obligations will require storage of more than [REDACTED] of data and cost
more than [REDACTED] in the first three years. Dkt. 781–3 at 5, 6. This is in addition to the [REDACTED]
mapping/linking tables that are the subject of Google’s Motion for Relief filed on October 27, 2022,

1 which would total approximately [REDACTED] of data and [REDACTED] over the course of three
2 years. *Id.* But the monetary cost, although enormous, is just the tip of the iceberg. The ordered
3 preservation is particularly burdensome because [REDACTED]
4 [REDACTED]
5 [REDACTED] Dkt 781–4, ¶¶ 3, 4. Preserving the relevant data beyond Google’s
6 normal retention periods just so that it can be deleted at a later time is counter-sensical and cannot
7 be justified in light of the extraordinary burden on Google to do so.

8 There is no longer a basis for onerous preservation that has continuously been justified by
9 reference to Plaintiffs’ Rule 23(b)(3) damages class. Google respectfully seeks an order (i) releasing
10 Google from its ongoing obligations under the Preservation Orders; and (ii) either (a) authorizing
11 Google to delete the data it has already collected and preserved; or (b) requiring Plaintiffs to cover
12 the cost of such preservation.

PLAINTIFFS' STATEMENT

While Plaintiffs have no desire to impose unnecessary costs on Google, Google's requested relief should be denied. Judge Gonzalez Rogers certified classes under Rule 23(b)(2), and Plaintiffs seek not only to preclude Google from collecting further private browsing information but also to have Google (subject to verification by an independent third-party): (1) delete all of the private browsing information that Google previously collected and is currently storing; (2) remove any services developed or improved with the private browsing information; and (3) other remedies that may be available to them under equity and Cal. Pen. §502 (*see, e.g.* §§502(g) on forfeiture). Separate and apart from the relevance of the preserved data if the Ninth Circuit grants Plaintiffs' Rule 23(f) appeal, Plaintiffs are concerned that Google's requested modification of its data preservation will undermine Plaintiffs' ability to obtain full and meaningful injunctive relief for the certified classes.

Google's request concerns data that is relevant. Google has never detailed exactly what it is preserving; it is therefore impossible to assess the precise prejudice that would result from Google's request to delete that data. Nevertheless, Plaintiffs believe that the preserved data remains relevant to Plaintiffs' request for their injunctive relief, particularly for identifying services developed or improved with private browsing information that Google obtained from tens of millions of Americans. The preserved data is also relevant to the claims of those Americans who might pursue individual actions against Google for its illegal behavior, including proving the highly offensive nature of the extensive, detailed information that Google collected and used for its own benefit, as well as the number of times that Google violated those individuals' privacy during the relevant period to calculate statutory penalties (*see, e.g.*, Cal. Pen. §637.2). Google should not be permitted to now destroy that data, and there is no justification for shifting that preservation cost to Plaintiffs.

Google Has Never Provided Details of What Is Being Preserved. Google estimates it will require storage of more than [REDACTED] to comply with the Court's current preservation orders, but this includes data sources (*e.g.*, logs and matching tables) that Google has never permitted Plaintiffs, the Special Master, or the Court to review, examine, or test. Plaintiffs asked, and Google refused. *See, e.g.*, Dkt. 800 (Plaintiffs requesting that the Special Master review newly-identified data sources); Dkt. 806 at 9 (Google opposition). Given Google's refusal to provide further

1 information, it is for example unclear whether Google has been preserving information related to
 2 the newly-revealed [REDACTED] detection bit, such as logs and tables containing that field.

3 The problem here is that Google wants to delete many [REDACTED] of data without any
 4 independent review of what that data is, where that data comes from and goes to in Google, and how
 5 that data could be used to support Plaintiffs' claims and to obtain injunctive relief. Google has even
 6 represented this private browsing data is on "orphaned islands" where its recovery is technically
 7 challenging. This is unquestionably prejudicial. Without knowing exactly what Google proposes to
 8 delete and what Google will preserve, neither Plaintiffs nor the Court are in a position to determine
 9 the severity of the prejudice Plaintiffs would suffer, or how that might impact class members who
 10 choose to separately seek statutory penalties and monetary damages from Google. Permitting
 11 Google to delete this information would reward Google's discovery misconduct throughout this case
 12 of cloaking discoverable information behind opaque walls that only Google has access to.

13 ***The Preserved Data Is Relevant to Plaintiffs' Injunctive Relief.*** Plaintiffs appreciate
 14 Google's admission that "large-scale preservation of event-level class-wide data is not required for
 15 Plaintiffs to litigate . . . the relief [Plaintiffs] seek." However, Plaintiffs still have the burden of
 16 proving their claims and entitlement to injunctive relief. The processes, services, algorithms, and
 17 other products that Google developed and improved with private browsing data are all at issue for
 18 Plaintiffs' injunctive relief (*see, e.g.* Cal. Pen. §502 *et seq.*), where Plaintiffs would seek appointment
 19 of an independent third-party to enforce any injunctive relief. Google opposed Plaintiffs' efforts to
 20 obtain this information during discovery. *See* Dkt. 411-1 at 12 (Google's objection to Plaintiffs'
 21 Rule 30(b)(6) topic concerning how Google used private browsing data to develop and improve
 22 Google's services, products, and algorithms because it would "implicate dozens of Google business
 23 units and products"). Google also obstructed these efforts with the Special Master. *See* Dkt. 588-1
 24 (sanctioning Google for hiding Incognito-detection bits and data sources). The preserved data is
 25 relevant evidence of what services, products, and algorithms Google developed and improved with
 26 the private browsing data of tens of millions of Americans, for purposes of crafting injunctive relief.

27 ***Class Members Have an Interest in the Preserved Data, and Plaintiffs Should Not Bear***
 28 ***Google's Preservation Costs.*** Google's proposal is an *ex parte* request to spoliage evidence. Google

1 contested Rule 23(b)(3) certification based on the affirmative defense of implied consent and
2 Google's claimed right to conduct discovery on tens of millions of people. Class Cert. Tr. at 18:4–
3 19:12. Google's proposal here would create an unjust imbalance of discovery—Google would be
4 permitted to spoliage evidence that any of those tens of millions of people might rely on to prosecute
5 their individual actions for liability and resulting statutory penalties and monetary damages (while
6 arguing that those claims for penalties are absent in this case). Meanwhile, Google would question
7 the credibility of those tens of millions of individuals' claims with the absence of that evidence. This
8 data is also relevant to assessing the offensive nature of Google's conduct. Google's preservation is
9 evidence of Google's massive collection of private browsing information during the relevant period
10 for individuals' claims—which Google could modify or deprecate in the meantime. The information
11 stored in those [REDACTED] of data could be used to support liability for Plaintiffs' (and any resulting
12 individuals') claims against Google for statutory penalties and monetary damages.

Respectfully submitted,

/s/ Andrew H. Schapiro

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Attorneys for Plaintiffs

ATTESTATION OF CONCURRENCE

I am the ECF user whose ID and password are being used to file this Joint Submission. Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in the filing of this document.

Dated: January 6, 2023

By: /s/ Andrew H. Schapiro

Andrew H. Schapiro

Counsel on behalf of Google LLC